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In the Supreme Court of the United States

OCTOBER TERM, 1975

ANTONIO HERNANDEZ REYES, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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Petitioner contends that there was no probable cause for the search of his car.

After a jury trial in the United States District Court for the Southern District of Texas, petitioner was convicted of possessing marihuana with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and was sentenced to three years' imprisonment, to be followed by a special parole term of three years. The court of appeals affirmed *per curiam* (Pet. App. 8-9).

On February 7, 1973, an informant told Agent John Donald, Jr. of the Drug Enforcement Administration that petitioner would be transporting, either on that day or the following, "a lot of Marijuana" that had been smuggled into the country, and that he possessed or had access to a white over blue Ford automobile (A. 10-12).[1]

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[1] "A." refers to the joint appendix filed in the court of appeals.

The unnamed informant had given Donald "[v]ery reliable" information at least a dozen times before (A. 40). The agent knew that petitioner had a reputation for involvement in marihuana transactions (A. 41).

Agent Donald drove to petitioner's house and saw a white over blue Ford and a 1972 Buick Skylark parked in front. From a registration check he learned that the Ford was registered to petitioner and that the Buick was rented. A short while later petitioner drove away from the house in the Buick; Donald followed him to an automobile rental agency, where petitioner exchanged the car for another 1972 Buick Skylark and returned home (A. 13-16). Donald knew from experience that rental cars were "very common[ly]" used in drug trafficking as a means both of concealing the identity of the vehicle used at any given moment and of avoiding forfeiture (A. 42).

Agent Louis Dracoulis had meanwhile begun surveillance from behind petitioner's house. When petitioner returned he drove to the rear of the house and parked; there, assisted by two other males, he made repeated trips between the house and the Buick, loading boxes and plastic garbage bags full of an undetermined substance into the rear seat and trunk of the Buick (A. 60-61, 96). The agents knew that garbage can liners are an "extremely common" means of transporting marihuana (A. 42).

Petitioner and his companions then drove away separately, petitioner in the Buick. The agents followed him onto Interstate 37, where he drove very slowly until joined in convoy by one of his companions; he then accelerated to the legal speed limit (A. 18-19).

The agents then stopped both cars, blocked the path of petitioner's car with their vehicles, and approached it on both sides with their revolvers drawn and at their sides (A. 22-23). As Dracoulis approached on the driver's side petitioner rolled down the window and Dracoulis immediately smelled what he believed to be marihuana (A. 91). Displaying his badge, he identified himself and asked petitioner what he was carrying; petitioner replied, "Marijuana" (*ibid.*). While Donald searched petitioner, Dracoulis opened the boxes on the back seat and confirmed that they contained marihuana. The agents then arrested petitioner.

1. The court of appeals correctly concluded that the search and seizure were legal. The tip, from an informant who had proven "[v]ery reliable" on numerous prior occasions, that petitioner would be transporting smuggled marihuana either on that day or the next and that he had a white over blue Ford, had been partially corroborated. It was supplemented by the agents' knowledge of petitioner's reputation (see *United States* v. *Harris*, 403 U.S. 573, 583) and personal observations of his suspicious use of rental cars, his loading of the rental car with packages commonly used to carry marihuana (cf. *Henry* v. *United States*, 361 U.S. 98, 104), and his seemingly prearranged convoy driving.

This information was sufficient to "permit the suspicions engendered by the informant's report to ripen into a judgment that a crime was probably being committed" (*Spinelli* v. *United States*, 393 U.S. 410, 418; *Draper* v. *United States*, 358 U.S. 307, 313) and to provide a "substantial basis" for the agents to conclude that petitioner's car was being used to transport marijuana. *Jones* v. *United States*, 362 U.S. 257, 271; *Carroll* v. *United States*, 267 U.S. 132, 149, 155-156; *Chambers* v. *Maroney*, 399 U.S. 42, 49. Accordingly, the stop and search of the car along the public highway were lawful.

2. Even if the agents did not have probable cause to search the car when they stopped it, they had reasonable suspicion to make an investigatory stop in order "to maintain the status quo momentarily while obtaining more information * * *." *Adams* v. *Willlams*, 407 U.S. 143, 146; *Terry* v. *Ohio*, 392 U.S. 1, 22-23. When Agent Dracoulis detected the smell of marihuana coming from the car, that suspicion ripened into probable cause both to arrest petitioner and to search his car.

The fact that the agents blocked the path of petitioner's car and approached him with guns drawn and at their side did not transform the forcible stop of his car into an arrest. The blockade was reasonable to "maintain the status quo," and, based on their founded suspicion that petitioner was transporting contraband, the agents could reasonably take precautions against the possibility that he was armed.

A law enforcement officer "making a reasonable investigatory stop should not be denied the opportunity to protect himself from attack by a hostile suspect." *Adams* v. *Williams, supra*, 407 U.S. at 146. Before Dracoulis smelled the marihuana, the agents did not point their guns at, issue an order to, or search petitioner. Compare *United States* v. *Strickler*, 490 F. 2d 378 (C.A. 9).[2] In view of "all the circumstances of the particular governmental invasion of a citizen's personal security" (*Terry* v. *Ohio, supra*, 392 U.S. at 19), the stop of petitioner's car was reasonable.[3]

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[2]In *Strickler* police surrounded the defendant's car, pointed a gun at the occupants, and ordered them to raise their hands. The court said: "The restriction of Strickler's 'liberty of movement' was complete [*i.e.*, he was arrested] when he was encircled by police and confronted with official orders made at gunpoint." 490 F.2d at 380.

[3]Petitioner's reliance on *Henry* v. *United States, supra*, to establish the time of his arrest, is misplaced. *Henry* antedated this Court's approval of investigative stops in *Terry* and *Adams*, and the determination that the time at which probable cause had to exist was when the officers stopped the car was based on a concession by the government limited to that case. See 361 U.S. at 103, n. 7.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.